Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc. and	)	CC Docket No. 02-35
BellSouth Long Distance for	)	
Provision of In-Region, InterLATA Services in	)	
Georgia and Louisiana	)	

COMMENTS OF US LEC CORP. AND XO GEORGIA, INC.

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SUMMARY

BellSouth should receive a failing grade concerning its provisioning of facilities and services to competitive local exchange carriers ("CLECs"). CLECs generally order facilities either as unbundled network elements ("UNEs") or as tariffed products from BellSouth's special access tariffs. BellSouth has demonstrated a great unwillingness to provide high-capacity UNE loops, multiplexing, and transport individually or in combination in order for CLECs to provide service to customers. BellSouth has also been unwilling to convert existing special access circuits to enhanced extended links, except under very limited circumstances. When CLECs wish to obtain high-capacity circuits, BellSouth's anticompetitive practices often force them to obtain such circuits from the higher priced BellSouth special access tariff, which are not subject to performance standards, or until now, subject to scrutiny under Section 271.

Regardless of whether the CLEC obtains UNE combinations or special access circuits, CLECs have been experiencing poor provisioning of such facilities. When the facilities are finally delivered, the CLEC and its customer have to endure numerous outages and poor response from BellSouth in regard to repair.

US LEC and XO Georgia, as major customers of BellSouth's high capacity facilities, have monitored BellSouth's performance in all stages of the provisioning process. What US LEC and XO Georgia have experienced is inadequate performance at all stages of the process. In the ordering phase, BellSouth continually returns firm order confirmations ("FOCs") beyond the required intervals. BellSouth also fails to provide a FOC that matches the customer's requested due date in numerous instances, and repeatedly fails to install the requested facilities on the promised date.

Once the facility is finally delivered, the nightmare really begins for the CLEC and the customer. For example, US LEC has experienced hundreds of outages since July 2001. To compound the problem, it takes BellSouth days to repair the outages. BellSouth has admitted that 50% of these outages are due to human error. BellSouth does not deny that it has serious issues with its network reliability. Its solution, however, is to form teams and action plans to address the matter. The teams are quickly disbanded, the action plans are never activated, and the problems continue, and get worse. The Commission must reevaluate its reluctance to review special access performance, especially since the line between special access facilities and DS-1 and DS-3 UNE facilities is blurring and becoming increasingly irrelevant.

Review of BellSouth's performance in regard to these vital facilities will leave the Commission with no other conclusion than that BellSouth is failing to meets its obligations in opening the Georgia and Louisiana markets to competition. BellSouth is also failing to meet the requirements of other vital checklist items. For instance in regard to Checklist Item 11, the performance data demonstrates that BellSouth is not meeting its obligations in regard to local number portability. BellSouth's response has been to challenge the metrics instead of improving its performance.

In regard to its OSS, there are significant concerns about the performance data that BellSouth is reporting. Numerous carriers have documented missing or inaccurate data that calls into question the validity of the data. Even taking the data at face value, however, BellSouth is not meeting the checklist requirements in regard to OSS.

BellSouth's application is also not in the public interest. BellSouth paints a rosy picture of competition in Georgia and Louisiana, but careful review of actual data on the state of competition portrays a much bleaker picture. Competition has failed to take root, and much of the blame must lie with BellSouth. BellSouth has not been promoting competition, but using anti-competitive measures to stifle competition. For instance, BellSouth engages in aggressive and potentially illegal win-back campaigns that disparage the financial stability and service quality of CLECs. Three states have had to impose marketing restrictions on BellSouth due to its anticompetitive conduct. The anticompetitive conduct takes other forms as well. CLECs have been forced to litigate over reciprocal compensation for ISP-bound traffic, and the applicable reciprocal compensation rate, despite the clear language of their interconnection agreements, and orders of the Georgia Public Service Commission requiring that such compensation be provided.

Granting BellSouth Section 271 authority is clearly not in the public interest, and BellSouth's Application should be denied.

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US LEC Corp. ("US LEC") and XO Georgia, Inc. ("XO") (collectively "Commenters"), submit these comments concerning the above-captioned Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance ("BellSouth") for Provision of In-Region, InterLATA Services in Georgia and Louisiana ("Application").[1] On October 2, 2001, BellSouth filed an application for Section 271 authority for the states of Georgia and Louisiana. On October 22, 2001, US LEC filed comments opposing the Application.[2] On November 13, 2001, US LEC and XO separately filed reply comments opposing the Application.[3] On December 20, 2001, BellSouth withdrew the application and stated its intention to initiate a new application shortly. On February 14, 2002, BellSouth

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1 Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Georgia and Louisiana, Public Notice, CC Docket No. 02-35, DA 02-337, released February 14, 2002.

2 Comments of El Paso Networks, LLC, PacWest Telecomm, Inc., and US LEC Corp., *Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Georgia and Louisiana*, CC Docket No. 01-277, Oct. 22, 2001 ("*US LEC Initial Comments*").

3 Reply Comments of El Paso Networks, LLC, PacWest Telecomm, Inc., and US LEC Corp., CC Docket No. 01-277, Nov. 13, 2001 ("*US LEC Reply Comments*"); Reply Comments of XO, NuVox, and Broadslate, CC Docket No. 01-277, Nov. 13, 2001.

submitted a supplemental application. In these comments, US LEC and XO renew and incorporate by reference their previous comments with respect to the initial application, all of which remain relevant, and show that BellSouth's supplemental filing does not demonstrate adequate performance or otherwise resolve the significant problems detailed by US LEC and XO. Accordingly, the Commission should deny the Application.

I. BELLSOUTH FAILS TO PROVIDE NON-DISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS IN VIOLATION OF CHECKLIST ITEM 2, AND NONDISCRIMINATORY ACCESS TO HIGH CAPACITY LOOPS AND TRANSPORT IN VIOLATION OF CHECKLIST ITEMS 4 AND 5

A. Legal Standard

Section 271(c)(2)(B) of the Telecommunications Act of 1996 ("1996 Act") requires a Bell operating company ("BOC") to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251(c)(3) and 252(d)(1). Section 271(c)(2)(B) also requires BellSouth to provide CLECs with DS-1 facilities for use as both high-capacity loop and transport facilities under checklist items 4 and 5. In evaluating BellSouth's performance for specific loop types such as DS-1 loops, the Commission must consider patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.[4] With respect to unbundled local transport, the Commission has required that BOCs provide both dedicated and shared transport to requesting

[4] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 122 (Apr. 16, 2001) ("*Verizon Massachusetts 271 Order*").

carriers.[5] This Commission has also required that the ILEC must provide all technically feasible capacity related transmission services, including DS-1 transport.[6]

B. BellSouth Fails to Provide Non-Discriminatory Access to High-Capacity Facilities, Thus Forcing CLECs to Purchase Such Circuits as Special Access

BellSouth fails to provide high-capacity facilities to competitive local exchange carriers ("CLECs") on a nondiscriminatory basis. High capacity facilities, such as DS-1 and DS-3 loops, multiplexing, and DS-1 and DS-3 transport, are used by CLECs in order to provision affordable, competitive broadband service options to business customers. The Department of Justice has noted the "unique attributes of high-capacity loops, which are key inputs for CLECs competing for business customers."[7] CLECs have attempted to purchase these facilities as unbundled network elements ("UNEs") pursuant to interconnection agreements, but resistance by incumbent local exchange carriers ("ILECs"), such as BellSouth, to provisioning of loops, multiplexing, and transport, individually or in combination, has forced CLECs to purchase identical facilities as special access products at prices above total element long-run incremental cost ("TELRIC").[8] BellSouth's intransigence in providing loops, multiplexing, and transport to XO and US LEC, or in converting existing special access circuits to UNEs, violates checklist items 2, 4 and 5, access to unbundled network elements, loops, and transport.

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[5] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 201 (1998) (*"Second Louisiana Order*").

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") at ¶ 308.

[7] *Application by SBC Communications Inc, Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provided In-Region, InterLATA Services in Missouri*, CC Docket No. 01-88, Evaluation of the United States Department of Justice at 7, n. 23 (May 9, 2001).

[8] *See* Comments of Time Warner Telecom and XO Communications, Inc., *Performance Measurements and Standards for Interstate Special Access Services,* CC Docket No. 01-321 (Jan. 22, 2002) ("*XO Special Access Metrics Comments*"). at 13.

XO purchases both special access circuits and UNEs from BellSouth. XO, like US LEC, would prefer to purchase UNEs rather than special access circuits because UNEs are priced at TELRIC, and special access circuits are not. For this reason, the Commission should not be surprised that XO, like other carriers, has experienced tremendous difficulty obtaining UNE loops, multiplexing and transport. BellSouth routinely rejects UNE orders for unlawful and anticompetitive reasons, thereby forcing CLECs to turn to higher-priced special access to serve their end user customers.[9]

First, BellSouth contends that, under existing law, they are not required to construct new facilities for UNEs. Where CLECs cannot rely on their own loop facilities, however, new construction is often needed. Moreover, the ILECs have attempted to stretch the meaning of "new construction" in an attempt to justify rejecting UNE orders that require nothing more than the installation of a line card or other minor electronics. BellSouth has adopted this tactic as a means of forcing CLECs to order special access in lieu of UNEs. Not only is this practice unlawful (even under the current definition of UNEs), but it also allows BellSouth to avoid application of any performance rules or penalties since no such rules and penalties apply to special access.

XO has also faced numerous practical problems with obtaining unbundled loops and loop-transport combinations (enhanced extended links or "EELs"). For example, once XO has gone through the process of ordering a special access circuit (thus establishing an "existing" combination in the ILEC network) and then has attempted to convert to an EEL, XO has encountered seemingly endless obstacles to conversion. When requesting EEL conversions, XO has experienced protracted negotiations, delayed conversion requests, threats from BellSouth to

[9] See XO Communications, Inc., *Ex Parte* Presentation, CC Docket No. 96-98, at 12 (filed Aug. 24, 2001) ("*XO*

impose additional charges (*e.g.*, special access surcharges), and long provisioning intervals.[10] For example, BellSouth represented to XO when XO initially sought to obtain EELs that the provisioning interval for an EEL would be 30 days, but XO could obtain the same circuit from BellSouth's interstate special access tariff in 5-7 days.

In addition to requiring CLECs to submit and process two orders for each circuit (one to obtain the special access circuit, another to request conversion to an EEL), most special access services are subject to early termination penalties. Many CLECs, including XO, have faced prohibitive penalties to convert a historical base of special access circuits to UNEs.[11]

Moreover, BellSouth refuses to provide UNE combinations if US LEC or XO commingles or mixes access services and local services on the same facilities to serve an end user customer. The commingling restriction denies US LEC and XO the use of an efficient network architecture because it significantly hinders their ability to achieve reasonable economies of scale when they cannot build facilities. The commingling restriction essentially forces CLECs that want to use UNEs in conjunction with access services to instead build parallel and inefficient networks within the existing ILECs networks.

In addition to encountering BellSouth's intransigence in obtaining UNE loops, multiplexing and transport, the CLECs will almost certainly face additional hurdles when the BellSouth predictably misinterprets the Enforcement Bureau's recent decision regarding

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Ex Parte").

[10] *XO Special Access Metrics Comments* at 13; *XO Ex Parte* at 12.

[11] *XO Special Access Metrics Comments* at 13.

conversion of special access services to EELs in an attempt to impede further CLECs' attempts to obtain UNE loops, multiplexing and transport.[12]

C. BellSouth Fails to Provide DS-1 UNEs at Parity

A critical component in evaluating BellSouth's performance in providing DS-1 facilities is whether BellSouth is providing the facilities in a timely manner.[13] BellSouth fails to provide DS-1 UNE intervals at parity with special access intervals that BellSouth provides to itself.[14] In fact, BellSouth has stated it has no obligation to provide DS-1 UNE interoffice channels or DS-1 UNE local channels at parity with its retail service analogues.[15] The problem is exacerbated by a lack of performance measurements that can be used to ensure that BellSouth is providing these facilities in a timely and nondiscriminatory manner.

In addition, BellSouth's retail division is able to order special access electronically while CLECs must place orders for DS-1 UNEs via a "less efficient manual process that is prone to delays."[16] Other BOCs, such as Qwest, have implemented electronic ordering processes for DS-1 UNE facilities.[17]

D. BellSouth Provides Poor Maintenance and Repair of DS-1 Facilities

CLECs have been experiencing numerous maintenance and repair problems with high-capacity UNEs. The record from the previous proceeding is replete with examples of

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[12] See *In the Matter of Net2000 Communications Inc. v. Verizon-Washington, D.C., Inc., Verizon-Maryland, Inc., and Verizon-Virginia, Inc.*, Memorandum Opinion and Order, File No. EB-00-018, FCC 01-381 (rel. Jan. 9, 2002).

[13] *Verizon Massachusetts 271 Order* at ¶¶ 156, 209.

[14] *Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996,* Docket No. 6863-U (Ga. PSC) ("*Georgia PSC 271 Proceeding*"), Comments of Cbeyond Communications, LLC at 10 (May 31, 2001) ("*Cbeyond Georgia PSC Comments*") at 18.

[15] *Id.* at 13.

[16] *Id.* at 16.

[17] *Id.*

maintenance and repair failures.[18] What is worse is the fact that these deficiencies are not being captured in performance metrics. Cbeyond noted in the previous proceeding that there "are no established performance measures for DS-1 UNE combinations, DS-1 interoffice channels, or DS-1 local channels."[19] Clearly, the lack of performance measures and penalties is reflected in BellSouth's substandard performance. In fact, BellSouth's provisioning of digital facilities has largely flown below the radar screen. AT&T notes that the KPMG test "evaluated only six UNEs for ordering, provisioning, and billing activities and did not include digital UNEs."[20]

XO considers the process of obtaining UNE loops, multiplexing, and transport in BellSouth territory to be almost a complete failure. Whether the UNEs are provided stand-alone or in combination, BellSouth's provisioning and maintenance performance is generally characterized by unreasonable delay and poor service quality. BellSouth clearly fails to provide non-discriminatory access to UNEs in violation of checklist item 2, and loops and transport in violation of checklist items 4 and 5. Accordingly, BellSouth's Application should be denied.

II. BELLSOUTH FAILS TO PROVIDE SPECIAL ACCESS FACILITIES AT PARITY

As discussed, BellSouth's anticompetitive tactics force US LEC and XO to purchase special access circuits in lieu of UNE loop, multiplexing, and transport combinations.[21] Even when CLECs purchase special access facilities, however, CLECs encounter substandard and

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[18] See CC Docket No. 01-277, Comments of KMC Telecom at 3-8 (October 22, 2001) ("*KMC Comments*"),

[19] CC Docket No. 01-277, Comments of Cbeyond Communications, LLC at 6 (October 22, 2001) ("*Cbeyond Comments*").

[20] *See* CC Docket No. 01-277, Georgia Public Service Commission's Consultative Report at 79 (October 19, 2001) ("*Georgia PSC 271 Order"*) at 79, *citing, AT&T Norris Affidavit* at ¶ 75.

[21] CLECs have been forced to purchase special access circuits instead of UNEs due to other BellSouth practices. For instance, BellSouth refuses to convert special access multiplexers to UNE multiplexers thereby requiring a CLEC to purchase special access circuits to access the multiplexing functionality. *Cbeyond Georgia*

discriminatory provisioning and maintenance that significantly impacts their ability to compete. US LEC and XO are two of BellSouth's primary facilities-based competitors, each spending in excess of $38 million annually to purchase services from BellSouth. While one would think that customers of this magnitude would receive high quality service, BellSouth provisions these facilities to US LEC and XO in a discriminatory manner since it knows that this Commission has heretofore declined to evaluate a BOC's special access provisioning. As discussed above, the problems that XO has experienced with respect to UNE loops and transport facilities are shared by CLECs such as US LEC that order only special access facilities. XO knows firsthand how BellSouth provides special access circuits at the same deplorable performance level as UNE loops because XO purchases both special access circuits and UNE combinations from BellSouth in Georgia. Regardless of how the facilities are characterized, CLECs are enduring pervasive problems in the provisioning and repair of the facilities. US LEC's and XO's experiences demonstrate that BellSouth's inadequate wholesale performance pervades all aspects of BellSouth's special access provisioning.

A. The Need for Monitoring of Special Access Provisioning

The Commission should reevaluate its blanket exclusion of special access services from Section 271 Competitive Checklist considerations. The Commission based its exclusion on the following:

> Although dedicated local transport and the interoffice portion of special access are generally provided over the same facilities, they differ in certain other respects. A number of these parties, however, assert that the checklist requirements focus on the provision of physical facilities, not the regulatory classifications that apply. We do not believe that checklist compliance is intended to encompass the

PSC Comments at 10. CLECs have also experienced problems connecting UNE loops to special access transport. *Id.* at 8.

> provision of tariffed interstate access services simply because these services use some of the same physical facilities as a checklist item.[22]

The line between special access facilities and DS-1/DS-3 UNE facilities is increasingly becoming irrelevant for regulatory purposes. As one commenter notes:

> The "special access line" is largely a consequence of the interLATA line-of-business restriction that BellSouth seeks to have removed in this proceeding. In simple terms, customers make two types of calls: local calls and long distance calls. Many larger customers separate these calls between two types of connections – so called "switched access lines" (for calls that BellSouth can handle), and "special access lines" (for calls that BellSouth cannot). This distinction, however, does not fundamentally change the service the customer is receiving, it only changes which carrier (BellSouth or a long distance company) terminates the call. Significantly, CLECs typically offer integrated services that render any distinction between "switched" and "special" lines irrelevant – CLEC lines are both "switched" and "special" because they handle both local and long distance calls.[23]

Thus, regardless of how the facility is characterized from a regulatory or tariffing perspective, the CLEC uses the facility to provide the same essential functions. This Commission has itself recognized that "incumbent LECs routinely provide the functional equivalent of an EEL through their special access offerings."[24] The Georgia Public Service Commission ("Georgia PSC") has also found that "special access circuits and DS-1 combos are the same thing."[25] Further, in a workshop conducted by the Georgia PSC in November 2001, Jerry Hendrix of BellSouth admitted that the only difference between a UNE combination and a special access circuit was pricing. SBC and Qwest provide the same provisioning intervals for

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[22] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 (1999), at ¶ 340 ("*Bell Atlantic New York 271 Order*").

[23] *Georgia PSC 271 Proceeding,* Reply Comments of the Southeastern Competitive Carriers Association (July 16, 2001), ("*SECCA Georgia PSC Reply Comments*"), Affidavit of Joseph Gillan at ¶ 16 ("*Gillan Affidavit*").

[24] *UNE Remand Order* at ¶ 481.

[25] *Re MCIMetro Access Transmission Services, LLC*, Docket No. 11901-U, Order on Reconsideration (Ga. PSC) 2001 WL 1021085, *2 (April 17, 2001) ("*MCImetro GA Order*").

special access and DS-1 combinations.[26] Thus, it is an anomaly for the Commission to scrutinize a BOC's performance for facilities when they are classified in one category, but to not evaluate its performance for those same facilities when they are classified in another category.[27]

The situation is particularly troublesome when the CLEC is forced to order the facilities as special access facilities rather than as UNEs. In the proceeding at the Georgia PSC, it was noted that provisioning intervals for DS-1 UNEs are much longer than retail special access intervals, thus forcing CLECs to order higher priced special access services to obtain shorter provisioning intervals that are competitive at the retail level.[28] In addition, it was noted that if a CLEC wants to utilize UNE multiplexers, it must purchase special access circuits.[29] Also, while BellSouth's retail unit is able to order special access circuits electronically, CLECs must place orders for DS-1 UNEs via a "less efficient manual process that is prone to errors and delays."[30] Given the Commission's position, this forced migration of CLECs to special access facilities essentially removes provisioning of high-capacity facilities from regulatory oversight.

The Commission's position is particularly damaging given the difficulties CLECs have been experiencing with regard to the provisioning of special access services. While the Commission is currently examining whether to adopt special access performance standards, there is no guarantee that it will adopt any. ILECs have argued that this Commission has exclusive jurisdiction over mixed-use special access facilities and denies that state commissions have

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[26] *Id.*

[27] *See also XO Special Access Metrics Comments* at 2 et seq. ("In the many circumstances in which ILEC special access is the only means of obtaining high-capacity end user connections, special access must be viewed as basically a category of unbundled network elements purchased under Sections 201 and 202 of the Act.")

[28] *Cbeyond Georgia PSC Comments* at 15.

[29] *Id.* at 9.

[30] *Id.* at 16; *see also, MCImetro GA Order* at *1.

jurisdiction over such facilities.[31] Thus, these facilities fall into a regulatory "black hole" if a state finds it has no jurisdiction over mixed access facilities, and this Commission declines to set standards for special access provisioning. This unfortunate reality provides even more of a perverse incentive for BellSouth to coerce CLECs into ordering higher priced special access.

B. Ordering/Provisioning of Special Access Facilities

US LEC monitors BellSouth's provisioning of high capacity facilities in both the ordering and actual delivery phases, and BellSouth's provisioning of T-1s in three specific areas. The first is firm order confirmation ("FOC") interval. US LEC designed this metric to measure BellSouth's ability to meet an interval of 48 hours to return a FOC, except for project-managed orders and local interconnection trunks.[32] In July 2001, 36% of US LEC orders had the FOC returned beyond the 48-hour interval; in August 2001, 31% of the orders were returned beyond the interval; and in September 2001, 31% of the orders were returned beyond the interval. XO has experienced similarly deplorable performance from BellSouth. Clearly, these are unacceptable intervals and impact a CLEC's ability to manage installation of services for its customers.

US LEC also measures BellSouth's ability to provide a firm order confirmation that matched US LEC's requested due date or customer desired due date. In July and August 2001, 8% of the FOCs did not meet the requested due date, and in September 2001, 7% did not meet the requested due date. US LEC also reviewed BellSouth's ability to install in accordance with

[31] *See, Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' provision of Special Access Service,* Docket No. 01-34 (Mass. DTE), AT&T Communications of New England, Inc.'s Response to Verizon's Comments at 2 (April 30, 2001) ("*AT&T Massachusetts Response*").

US LEC's requested due date. The facility acceptance date should be the day BellSouth delivers the circuit to US LEC. In July 2001, for 16% of the orders, the acceptance date did not match the requested due date; in August 2001, the requested due date did not match the acceptance date for 18% of the orders; and in September 2001, the percentage was 18%. US LEC also tracked the average number of business dates missed, which was two days for July, August, and September 2001. XO's experience with BellSouth meeting the requested due date mirrors US LEC's. Again, these performance results are clearly unacceptable.

US LEC and XO also have encountered numerous instances of "blind FOCs." A blind FOC is when BellSouth sends US LEC or XO a firm order confirmation date, and then on or near the delivery date notifies US LEC or XO that the facility is not available and will not be delivered on the date. Based on the FOC received early on in the special access ordering process, XO or US LEC will have scheduled the cut-over date with the customer and will have prepared to handle the cut-over by making arrangements with its technicians, the staff of its customer, and the technicians who support the customer's customer-premise equipment. BellSouth simply cancels the date without explanation. This failure of BellSouth is not merely a matter of inconvenience, but one that wastes valuable time and resources of both the CLEC and the customer. Furthermore, the customer will not know the cause of the delay and will in all likelihood blame the CLEC. The delays in the ordering and provisioning of these facilities clearly impact the competitive position of CLECs and BellSouth has every incentive to engage in substandard provisioning, especially if it knows its performance is not monitored by this or any other Commission.

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[32] The 48-hour interval is an industry standard, and is the interval that BellSouth uses to report performance on its website.

US LEC and XO also have experienced continuing problems with circuits that are experiencing "infant troubles," or in BellSouth's terminology "turned up broke" ("TUB"). When this occurs, the CLEC is placed in the middle between the provisioning center that refuses to work the trouble on the grounds that their responsibility was to provision the circuit, which they did, and the repair center that does not want to accept a trouble ticket for a circuit that has never worked. Hours go by while the CLEC waits for one of the BellSouth organizations to accept responsibility.

Moreover, what cannot be found in any data submitted by BellSouth is the number of customers that stay with BellSouth and cancel their order with the CLEC as a result of these delays caused by BellSouth. If the customer decides to cancel its order with the CLEC, its only near-term option is to stay with the monopoly provider.

C. Maintenance of High Capacity Facilities

In the Georgia PSC 271 proceeding, US LEC documented the severe problems it experiences with BellSouth's maintenance and repair of high capacity facilities.[33] When a customer reports an outage, it contacts US LEC. US LEC opens an internal trouble ticket and investigates the problem. When the trouble is isolated to BellSouth's network, US LEC opens a trouble ticket with BellSouth.[34] From January 2001 to July 2001, US LEC experienced 388 outages on these circuits that it determined were due to problems on BellSouth's network. There was no dispute as to the cause of the problem.[35] US LEC monitored the "BellSouth Resolution

[33] *Georgia PSC 271 Proceeding,* Comments of the Southeastern Competitive Carriers Association, Affidavit of James M. Hvisdas (July 13, 2001) ("*Hvisdas Affidavit*").

[34] *Hvisdas Affidavit* at ¶ 6.

[35] *Id.* at ¶¶ 7-9.

Time" and "Total Time Open in Hours." The "BellSouth Resolution Time" tracks the elapsed time for BellSouth to resolve trouble on its facility. The "Total Time Open In Hours" tracks the total elapsed time from the time the US LEC trouble ticket was opened through the BellSouth trouble ticket resolution time, and the monitoring time after the ticket was closed to verify with the customer that the problem was corrected. This figure gives a complete picture of the customer's down time.[36] The average length of time required by BellSouth to resolve the trouble tickets was 54 hours. The average Total Time Open for these outages was 181 hours.[37] Outages of this frequency and duration imperil competition for customers who need high-capacity facilities. Since these facilities are used for vital business services, any protracted outage negatively impacts the CLEC's ability to keep the customer or obtain new ones, as well as the CLEC's reputation and brand.

Although BellSouth has shown improvement since July 2001, the problems with outages continue for US LEC. As of early October, US LEC experienced an average of three outages a day. While this number dropped for the remainder of October, outages have increased dramatically since then to be as high now as they were at the end of September. US LEC experienced 80 outages in December 2001, only slightly less than three outages a day.

BellSouth has also shown improvement in its resolution time, but BellSouth fails to come close to its tariffed Mean Time To Repair ("MTTR"). US LEC's data shows that for the outages from the end of August to October 12th, the mean time to repair was over nine hours. US LEC certainly prefers an MTTR of 9 hours, rather than the 54 hour MTTR it experienced in the first half of 2001, but BellSouth's tariffed MTTR is 4 hours. BellSouth still has a long way to go

[36] *Id.* at ¶¶ 9-10.

[37] *Id.* at ¶ 11.

before it can be considered in compliance with acceptable repair intervals. Further, while BellSouth's average Total Time Open has shown improvement since the 181 hours from the first half of 2001, the average duration of each outage remains at the unacceptable level of 33 hours in October, 26 hours in November, and 16 hours in December.

Many of the outages appear to be due to gross human error on the part of BellSouth. In fact, during the October 18, 2001 weekly call during which US LEC and BellSouth review the outages from the preceding week, BellSouth representatives stated that in a review of 463 trouble tickets, 50% of US LEC's outages were the direct result of human error. It is not clear why the problems are being caused, and BellSouth's escalation process is very deficient. Moreover, BellSouth technicians are apparently making these errors in spite of internal safeguards such as alarm and warning signals prior to taking live circuits down. Outages due to human error can be prevented through better training and supervision. The fact that the outages have not been abated demonstrates BellSouth's disregard for service quality.

Attached as Exhibit A to these Comments is correspondence between US LEC and BellSouth that shows not only the severity of the problem and the time and expense US LEC has had to incur to seek resolution of the problem, but also BellSouth's failed response. The following is a summary of the correspondence:

- <u>June 13, 2001 BellSouth Letter from Susan Arrington, Manager, Regulatory and External Affairs to Terri Lyndall, Georgia counsel for US LEC</u> – BellSouth admits that there is a problem with its performance in provisioning and maintenance of special access facilities, but attempts to allay US LEC's concerns by stating that "US LEC is not the only customer that has expressed concern about BellSouth's performance with respect to special access." BellSouth states that in response to the "failure frequency issues" it has implemented a Failure Frequency Process Improvement Team to "analyze the failure frequencies, identify root causes, and develop gap closure plans." It also stated that as a result of the team's findings, the changes would be implemented in the "near future."

- July 11, 2001 US LEC Letter from Wanda G. Montano, Vice President, Regulatory & Industry Affairs to Susan Arrington, BellSouth – US LEC notes BellSouth's failure to make any specific commitments to rectifying US LEC issues. US LEC observes that despite the purported actions taken by BellSouth there has been no improvement in BellSouth's performance. US LEC asks for specifics about the "team" BellSouth put together to address the issue and how it managed to complete its work so quickly. US LEC notes how BellSouth's remark that other CLECs are experiencing network outages proves US LEC's point – that there is no network reliability.
- August 21, 2001 BellSouth Letter from Susan Arrington to Wanda Montano, US LEC – BellSouth claims that its Failure Frequency Process Improvement Team had been working on the problems for "some time" and has "completed its investigations and released its findings." BellSouth fails to offer any more specifics nor does it commit to a timeframe for root cause analysis that US LEC requested in its July 11th letter.
- September 21, 2001 US LEC from Aaron Cowell, Jr., President, to Phil Jacobs, President, BellSouth-Georgia – The letter follows-up on a meeting the two had at the end of August. Mr. Cowell regrettably notes that he had hoped the situation would improve after the meeting, but it has not. US LEC experienced its second OC48 outage affecting numerous US LEC customers. At the August 29th meeting, US LEC had expressed concern about the first OC48 outage that had taken 4 ½ days to resolve. US LEC also continued to experience situations where DS-3 and DS-1s are unmapped and removed in central

offices. The DS-3s contain live DS-1 circuits on them, and safeguards are in place to prevent live circuits being taken down, but the circuits keep being taken down. Another customer was out of service for seven hours on Monday, seven hours on Tuesday, and five hours on Wednesday because BellSouth could not find a clean cable pair. BellSouth then informed US LEC that the only solution would be to pull new fiber and gave a September 30th due date for the new fiber. Meanwhile, the customer remained out of service. US LEC attempts to no avail to escalate problems through the Access Customer Advocacy Center ("ACAC"). US LEC then contacted the office of Mr. Jacobs, who had given the assurances at the August meeting of improved service, but were advised that it was calling too much and to stop calling Mr. Jacob's office. US LEC would not have to attempt to escalate to that level if the ACAC and BellSouth's normal channels were responsive. US LEC notes that BellSouth has left it no alternative but to seek the assistance of the Georgia Public Service Commission.

- September 26, 2001 Letter from Phil Jacobs, BellSouth, to Aaron Cowell, Jr., US LEC– Mr. Jacobs states he has forwarded Mr. Cowell's letter to the Interconnection Services Group and that the issues raised are "operational issues" that are more appropriately addressed to US LEC's BellSouth account team.
- October 8, 2001 Letter from Quentin Sanders, Vice President – Sales, Interconnection Services to Aaron Cowell, Jr. – BellSouth admits that the two OC48 outages were caused by problems with BellSouth facilities. BellSouth claims it took "proactive steps" to address the issue, but if so, it is unclear why the outages were so long and so disruptive. BellSouth also states that an action plan was implemented to address the two outages, but it still had not completed root cause analysis on the problem. BellSouth states that it

wished US LEC would have waited for it to implement its action plan before taking the issues to the Georgia Public Service Commission.

It is noteworthy that BellSouth's "responsiveness," which was already problematic, declined after BellSouth's Section 271 application was endorsed by the Georgia PSC. And the doors to upper level management for escalation purposes were quickly closed. The letters also demonstrate that BellSouth admits that it has a problem with its special access provisioning and that US LEC is not the only CLEC affected. BellSouth's response is to form teams and action plans, but the continued nature of the outages demonstrates that these responses are ineffectual. In fact, the paucity of details as to the actual nature of the BellSouth initiatives to address the problems suggests that they are Band-Aid solutions at best. In particular, it is troubling that the team BellSouth established was so quickly disbanded given the continuing nature of the problems. These outages are putting CLEC customers out of service for days and give customers the undeserved impression that CLECs cannot provide quality service. Customers do not care if BellSouth is the cause of the problem; the customer has purchased reliable service and quick restoration of service when problems occur.

D. The Need for Performance Measurements and Penalties

It is clear from BellSouth's deficient performance in regard to special access circuits that adequate standards need to be established to ensure adequate provisioning.[38] For instance, the "penalty" that BellSouth currently pays under the applicable tariff for outages is a service credit that is limited to the monthly charge for the circuit once the circuit has been out of service for 4 consecutive hours. Even if a circuit is down more than once, the CLEC customer is only reimbursed once. If the circuit is out of service for less than 4 hours, then the credit issued by

BellSouth is 1/1440th of the monthly cost multiplied by each 30 minute increment of outage (according to BellSouth's tariff, there are 1,440 30-minute increments in a month). So, a circuit that bills $325 per month and is out for 60 minutes is credited 46 cents ($325 divided by 1440 = 23 cents times two 30-minute increments). This paltry amount – be it the full circuit amount or the laughable 46 cents -- by no means compensates CLECs for the damage, both tangible and intangible, caused by the outage.

BellSouth also fails to proactively monitor its network. US LEC has repeatedly asked BellSouth if it monitors its network such that BellSouth is aware of the trouble and working on it without waiting to be notified by US LEC. BellSouth has repeatedly advised US LEC that it does not proactively monitor facilities at the DS-3 level. At the DS-1 level, reports are prepared 24 hours in arrears.

BellSouth also self-reports its performance metrics by characterizing trouble tickets as either Info tickets or as trouble tickets, as it suits BellSouth. This characterization of tickets affects the performance metrics as well as salary treatment of BellSouth employees, depending upon whether the metrics are met. US LEC challenged a number of trouble tickets that BellSouth had characterized as Info tickets. US LEC believed they were improperly classified. BellSouth investigated itself (since the CLECs have no ability to do so) and US LEC was told that BellSouth had mischaracterized 30% of its US LEC trouble tickets. US LEC attached a series of e-mails on this issue to its comments in the previous proceeding, These tickets are allegedly being re-reported. On September 14, 2001, US LEC requested a detailed list of the tickets that were being re-characterized, as well as those which remained as Info Tickets. This would allow US LEC to determine whether BellSouth has corrected all of the tickets. As of the

[38] *See XO Special Access Metrics Comments;* Comments of Focal Communications Corporation, Pac-West

date of US LEC's filing in the previous proceeding, BellSouth had not provided the new report. Astonishingly, now almost five months later, BellSouth still has not provided US LEC with the report US LEC requested in September.

For these reasons, the Commission should deny BellSouth's Application and adopt special access performance measures in CC Docket No. 01-321.

III. BELLSOUTH FAILS TO PROVIDE ADEQUATE NUMBER PORTABILITY IN VIOLATION OF CHECKLIST ITEM 11

Section 271(c)(2)(B) of the 1996 Act requires an RBOC to comply with number portability requirements of section 251 as implemented by the Commission. Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[39] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[40]

In the *Second Louisiana Order*, this Commission found that BellSouth failed to meet Checklist Item 11 because of its poor performance in coordinating provision of loops with number portability.[41] In the previous proceeding regarding BellSouth's application for section 271 authority in Georgia and Louisiana, AT&T noted how its business customers lost the ability

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Telecomm, Inc., and US LEC Corp., CC Docket No. 01-321 (filed Jan. 22, 2002).

[39] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 369 (June 30, 2000) ("*SBC Texas 271Order*").

[40] *Id.*

[41] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 279 (1998) (*"Second Louisiana Order*").

to receive calls from BellSouth customers because BellSouth failed to perform translation work on its switch at the time the number was ported.[42] KMC noted that BellSouth will often perform only a partial disconnect when porting numbers, leaving the end user unable to receive calls approximately 20% of the time.[43] AT&T also observed how BellSouth has difficulty porting a subset of a customer's numbers. To remedy this, AT&T had to develop a manual work-around to ensure BellSouth does translation work on the due date.[44]

Both XO and US LEC have had to rely on similar work-around procedures to deal with BellSouth's failures in regard to number portability. When BellSouth changes the facility due date, it often fails to link the number portability order associated with the facility with the change in the facility due date. This can result in the customer being taken out of service when the number is ported prior to the facility being delivered. As a result, both XO and US LEC have implemented a policy that delays entering the Local Service Request into BellSouth's system until it can be assured that the FOC date is met and the facility delivered. Should BellSouth meet its FOC date, the facility sits for some period of time unused by the customer and paid for by XO or US LEC. This is a penalty competitors must pay for having an unreliable vendor.[45] CLECs should not have to go through such machinations, and would not have to if BellSouth provided reliable number portability. AT&T also showed in the Georgia state proceeding how BellSouth will erroneously reassign a number ported to a CLEC customer to a new BellSouth line, and how this rarely happens to BellSouth customers.[46] The problems are compounded by a lack of service

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42 *See* CC Docket No. 01-277, Georgia Public Service Commission's Consultative Report at 79 (October 19, 2001) ("*Georgia PSC 271 Order*") at 199.

43 *Id.*

44 *Id.*

45 *US LEC Initial Comments* at 14-17.

46 *Georgia PSC 271 Order* at 199.

center support due to insufficient staffing. For instance, until recently, all LNP-related problems were referred to a single person.[47] BellSouth has recently added another person to cover the hours when the initial contact person is out of the office, but given all the problems with LNP issues, more than one or two people are clearly needed.[48]

BellSouth's effort to remedy this poor performance unlawfully places the financial burden to implement LNP squarely on the CLEC. After BellSouth withdrew its application in October, BellSouth implemented a new policy that any "coordinated LNP cuts" that are to be performed at any time other than 8:00 AM to 5:00 PM are subject to new hourly surcharges. A new BellSouth entity called "BellSouth Professional Services" has billed US LEC and XO $300 for the first hour of service implementing the coordinated LNP cut and $150 for each additional hour. These charges are in addition to the technician's charges that US LEC and XO already pay for LNP cuts.

Further, BellSouth insists that US LEC and XO sign a "Quote Sheet" that states that each carrier agrees to these charges. BellSouth refuses to process US LEC's and XO's LNP orders unless XO and US LEC each sign a Quote Sheet. These "BellSouth Professional Services" surcharges do not appear in BellSouth's Georgia tariffs, and there is no reference to them in US LEC's or XO's interconnection agreement. While BellSouth has identified sections in US LEC's and XO's Georgia agreements that purportedly give BellSouth the right to charge these exorbitant fees, both contracts refer only to "the application of overtime billing charges."[49]

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[47] *Georgia PSC 271 Proceeding*, Reply Comments of AT&T (filed July 16, 2001) at 49. ("*AT&T Georgia PSC Reply Comments*").

[48] *Id.*

[49] US LEC Georgia Interconnection Agreement, Attachment 6, Section 1.2; XO Georgia Interconnection Agreement, Attachment 6, Section 1.2.

Accordingly, under both agreements, BellSouth must perform the after-hours operations, and bill US LEC and XO only the corresponding overtime charges incurred.

In addition, as the Carrier Notification attached as Exhibit B indicates, the coordination of "after hours cuts" by BellSouth Professional Services was described as a "market trial" in which CLECs were "invited" to participate. Refusing to process US LEC and XO orders unless US LEC and XO agree to pay as much as $600 for each coordinated LNP cut can scarcely be considered an invitation to participate. US LEC has reluctantly signed the Quote Sheet in order to have its orders processed, but it is doing so under protest while preserving its rights to dispute these charges. XO similarly will be forced to sign the Quote Sheet unless it wants to run the risk of losing customers due to BellSouth's unreasonable demands.

Moreover, an overwhelming majority of US LEC's coordinated LNP cuts fall outside the time window established by BellSouth. BellSouth's imposition of onerous surcharges on these coordinated LNP cuts suggests that the new surcharges are designed solely to impede the growth of CLECs like US LEC and XO. These charges are unlawful because, if allowed to remain in effect, will preclude meaningful competition.

The performance data that BellSouth reports show that there are clearly problems with LNP. In Georgia, BellSouth was not even close to satisfying the performance metric for LNP-Average Disconnect Timeliness Interval and Disconnect Timeliness Interval Distribution (P-13). As XO reported to the Georgia PSC, BellSouth has fallen short of the benchmark at a shocking rate. In April 2001, BellSouth missed the performance benchmark an astonishing 97% of the time.[50] The situation did not improve between April 2001 and December 2001. For the most recent reporting period, December 2001, BellSouth reported a 93% miss rate for this

[50] *SECCA Georgia PSC Reply Comments*, at 24.

performance metric, which would have resulted in $2.3 million Tier I and Tier II penalty payments.[51] BellSouth's solution was to seek to have the metric rewritten and proposed adoption of alternatives to P-13 to recognize "the importance of triggers and their effect on the LNP process."[52] These alternatives were subcategories of P-13, identified as P-13B, P-13C, and P-13D.[53] For December 2001, even under the revised metrics, BellSouth reported an aggregate 95% miss rate for metric P-13D (LNP-Disconnect Timeliness, Non-Trigger). This metric requires BellSouth to maintain an average disconnect-timeliness interval of less than 12 hours for orders that do not meet the "trigger." In other words, 95% of the time, BellSouth could not complete a non-trigger LNP order within 12 hours of its due date. For US LEC, BellSouth's performance was even worse. BellSouth hit the performance benchmark on only 5 of 1405 responses, for a miss rate of 99.6%. In other words, BellSouth provided timely LNP service to US LEC in Georgia in December 2001 for orders that did not meet the "trigger" only 0.4% of the time.

Because BellSouth has performed so poorly as measured under the new and improved metric, BellSouth is once again attempting to change the performance metric to some other

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[51] The December 2001 data was filed at the Georgia PSC on February 14, 2002, the same date that BellSouth filed its Supplemental Application at the FCC. *Performance Measurements for Telecommunications Interconnection, Unbundling, and Resale,* Docket No 7892-U, letter dated February 14, 2002, from Bennett L. Ross, BellSouth, to Reece McAlister, Executive Secretary, Georgia Public Service Commission.

[52] BellSouth Telecommunications, Inc.'s Motion to Modify Service Quality Measurements, *Performance Measurements for Telecommunications Interconnection, Unbundling, and Resale,* Docket No 7892-U (Ga. PSC June 27, 2001) at 3. A "trigger" "gives the end user customer the ability to make and receive calls from other customers who are served by the customer's host switch at the time of the LNP activation. This ability is not dependent upon BellSouth working a disconnection order. In other words, when a trigger is involved, an end user customer can receive calls from other customers served by the same host switch before the disconnect order is ever worked." *Id.* at 2-3.

[53] The Georgia PSC ordered BellSouth to implement the proposed alternatives in addition to the existing metric on a trial basis, subject to review by Staff and the Commission. *Performance Measures for Telecommunications Interconnection, Unbundling, and Resale*, Order on BellSouth Telecommunications, Inc.'s Motions to Modify Service Quality Measurements and to Maintain Funds in Escrow and Notice of Deposit of Funds into an Escrow Account, Docket No. 7892-U (Ga. PSC rel. Oct. 25, 2001).

standard it believes it will meet. Quite obviously, performance standards should be set at the level necessary for BellSouth to achieve excellent customer service, not at some lower level that BellSouth can always meet. In addition, BellSouth has refused to pay the allegedly self-effectuating performance penalties to the CLECs and the Georgia PSC until such time as BellSouth believes it can no longer argue with the Georgia PSC to continue to change the metric.[54] At a minimum, the Commission should dismiss BellSouth's Application until the Georgia PSC and the parties in the performance measurements docket are able to resolve the disputes regarding this performance metric.

BellSouth's performance deficiencies are particularly troubling because, as the Commission has noted, number portability is essential to meaningful competition and provides consumers flexibility in the way they use their telecommunications services.[55] It appears that BellSouth's strategy for metrics it does not like is to first apply self-help by not paying the penalties, and then attempt to have the metrics changed, as opposed to determining the root cause of the problem.

Number portability was another one of the deficiencies found by this Commission in regard to BellSouth's prior applications.[56] Once again, BellSouth has had three years to sort these issues out. The Georgia PSC notes many missed metrics in regard to LNP, but glosses over them, stating that "as a general rule" BellSouth provides number portability in a

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[54] The Georgia PSC schedules semi-annual reviews of its performance metrics. The last review lasted over three months and the Georgia PSC has yet to issue an order on the outcome of the review. Because of this uncertainty and BellSouth's continued refusal to comply with its penalty payment obligations, CLECs must operate on shifting sands, never knowing what performance metrics will be used for any particular period of time. In addition, the CLECs have expended a great deal of resources attending the workshops, refuting BellSouth's data, and responding to BellSouth's proposals. The next review is due in April and because of BellSouth's delaying tactics, the industry still does not have a final order from the last review.

[55] *AT&T Georgia PSC Reply Comments* at 49, *citing*, *In the Matter of Telephone Number Portability*, 11 FCC Rcd. 8352, ¶ 28 (1996).

[56] *Second Louisiana Order* at ¶ 279.

"reasonably accurate and timely manner."[57] Assuming *arguendo* that missing so many metrics still allows BellSouth to be "reasonably" close, "reasonably" close is not the standard, particularly in an area where BellSouth has been historically deficient. The Georgia PSC admits it "remains concerned with the whole LNP process."[58] Its solution is to study the matter further and perhaps discard such metrics as LNP disconnect timeliness, an area in which its performance is particularly problematic. [59] The Commenters fail to see how discarding metrics will improve BellSouth's performance. Accordingly, the Commission should deny BellSouth's Application because BellSouth fails to satisfy the competitive checklist item for local number portability.

IV. BELLSOUTH FAILS TO PROVIDE NON-DISCRIMINATORY ACCESS TO OSS IN VIOLATION OF CHECKLIST ITEM 2

A. Legal Standard

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements.[60] In analyzing whether a BOC provides non-discriminatory access to OSS for Section 271 purposes, the Commission has adopted a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[61] The Commission has traditionally focused on the functionality and capacity of the BOC's OSS in its analysis of this step.

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[57] *Georgia PSC 271 Order* at 202.

[58] *Id.*

[59] *Id.*

[60] 47 U.S.C. § 271(c)(2)(B)(ii).

[61] *SBC Texas 271 Order* at ¶ 96.

In the second step, the Commission determines if "the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[62] It looks at performance measures and other evidence of commercial readiness.

It must be noted from the outset that the Georgia OSS testing performed by KPMG was designed by BellSouth and paid for by BellSouth. US LEC and XO do not believe that this structure results in an unbiased and reliable framework within which to evaluate the performance of an OSS system. However, as will be demonstrated below, BellSouth has failed its own OSS testing. US LEC, XO, and other CLECs believe that the testing designed by the Florida Public Service Commission and paid for by the Florida Public Service Commission constitutes a more unbiased analysis of BellSouth's performance, and believes this Commission should require such a test for Georgia and Louisiana, or at least postpone any decision on BellSouth's OSS capabilities until the Florida Commission releases its ruling on the Florida OSS testing, now scheduled for June 17, 2002.

In this case, both the general functionality/capability of BellSouth's OSS and its performance at the various stages of the OSS process demonstrate that BellSouth is not satisfying the requirements of the competitive checklist in regard to OSS.

B. Functionality and Capacity of BellSouth's OSS

The Commission requires that a 271 applicant demonstrate that its OSS is designed to accommodate both current and projected demand for competing carriers' access to OSS functions.[63] BellSouth has failed to make this demonstration.

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[62] *Id.*

[63] *Id.* at ¶ 97.

The Commission has previously relied on a combination of performance data and third-party testing to evaluate the overall functionality and capability of an applicant's OSS. The Commission has stated:

> [w]e examine performance measurements and other evidence of commercial readiness to ascertain whether the BOC's OSS is handling demand and will be able to handle reasonably foreseeable demand volumes. The most probative evidence that OSS functions are operationally ready is actual commercial usage. Absent data on commercial usage, the Commission will consider the results of the carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the scope of commercial readiness of a BOC's OSS. We reiterate, however, that the persuasiveness of third-party review is dependent upon the qualifications, experience and independence of the third party and the conditions and scope of the review itself.[64]

The evidence BellSouth has presented does not demonstrate that BellSouth's OSS is adequately handling current demand and is able to handle reasonably foreseeable demand volumes. There are questions as to the validity of its performance data and the conditions and scope of the independent third-party testing conducted. Even accepting BellSouth's OSS evidence at face value, the evidence does not demonstrate compliance with Checklist Item 2.

In Louisiana, concerns were raised about the validity of data submitted by BellSouth.[65] Staff noted that:

> AT&T makes numerous allegations concerning the integrity of the performance data that BellSouth has submitted in this docket. These allegations range from BellSouth's refusal to discuss data issues including refusal to perform root cause analysis to claims of missing data or data that is internally inconsistent or irreconcilable.[66]

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64 *Bell Atlantic New York 271 Order* at ¶ 89.

65 *Consideration and review of BellSouth Telecommunications, Inc.'s preapplication compliance with Section 271 of the Telecommunications Act of 1996 and provide a recommendation to the Federal Communications Commission regarding BellSouth Telecommunications, Inc.'s application to provide interLATA services originating in-region*, Louisiana PSC Docket No. U-22252(E), Staff's Final Recommendation at 19 (2001) ("*Louisiana PSC Staff Recommendation*").

66 *Louisiana PSC Staff Recommendation* at 43 (citations omitted).

The concerns in Louisiana are heightened because, unlike in Georgia, the data has not even been audited. Staff stated that it "does not believe that this Commission should delay resolution of this proceeding pending the outcome of the audit, which is intended as a safeguard to ensure data integrity going forward."[67] Staff, however, based its recommendation on the unaudited performance data, and, thus, the value of its findings as to that performance data is limited by the unaudited nature of the data. In fact, Staff states it is its "considered opinion that the best evidence of nondiscriminatory access to BellSouth's OSS is actual commercial usage in Louisiana."[68] The lack of audited data coupled with the lack of a third party OSS test in Louisiana leads one to question how accurate an insight into BellSouth's OSS such data provides.

Commenters are also concerned about whether BellSouth's OSS is able to handle future demand, and specifically about the scalability of BellSouth's OSS, *i.e.*, its ability to handle increasing numbers of orders. AT&T observed at the Georgia PSC proceeding that BellSouth's OSS does not "provide sufficient production capacity to process projected order volumes" and that "the production volume test of the Georgia Third Party Test demonstrated that the installed capacity of the ENCORE pre-ordering and ordering systems was one-half the forecast CLEC demand at year end 2001."[69] Sprint observed in the same proceeding that "KPMG, at BellSouth's apparent insistence, did not conduct the majority of volume testing on BellSouth's actual CLEC order production system."[70] BellSouth purportedly insisted on this because "they

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[67] *Id.*

[68] *Id.* at 41.

[69] *Id.* Item 2, at 7.

[70] *Georgia PSC 271 Proceeding,* Initial Comments of Sprint Communications L.P. at 6 (May 31, 2001) ("*Sprint Georgia PSC Comments*").

did not believe that their production system would be able to support those volumes."[71] WorldCom concurred, noting that its experience demonstrates that "BellSouth's OSS is not yet operationally ready to accept commercial volumes of UNE-P orders."[72] The Commission should ensure not only that BellSouth's OSS is functionally capable today, but that it will be able to handle higher volumes in the future.

In areas where BellSouth's OSS performance is most problematic, such as flow through and FOCs/rejects, the performance measures are less than stringent and are ill equipped to ensure adequate performance. For instance, BellSouth is only required to have 85% of eligible UNE orders flow-through.[73] This is below the standards set in the Verizon applications and the SBC applications.[74] Once again, this is an area in which BellSouth's performance has been problematic and being held to a lower standard will provide no incentive for improved performance.[75] The Department of Justice stated previously that it "is concerned about the validity of a number of measures that should be revised to provide regulators and competitors with meaningful performance data."[76] These measures include those pertaining to OSS availability, rejected orders, flow-through rates, jeopardy notices, hot cut timeliness, order completion interval, and trunk group performance.[77]

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[71] *Id.*, *citing*, Docket No. 8354-U, May 8, 2001 Hearing Tr. At 213 (Testimony of KPMG witness Weeks).

[72] *Georgia PSC 271 Proceeding,* Initial Comments of WorldCom, Inc. at Item ii, 3 (May 31, 2001) ("*WorldCom Georgia PSC Comments*").

[73] CC Docket No. 01-277, Comments of Birch Telecom of the South, Inc. ("*Birch Comments*") (Oct. 22, 2001) at 27.

[74] *Id.*

[75] *See US LEC Initial Comments* at 26.

[76] *DOJ Evaluation* at 35.

[77] *Id.*

Perhaps the most troubling fact about BellSouth's performance is that its less-than-adequate performance is actually inflated. AT&T discovered that certain BellSouth Local Carrier Service Centers ("LCSC") were giving priority to LSRs from Georgia over LSRs from other states.[78] As the Department of Justice determined:

> The Department is also gravely concerned by BellSouth's admission that it did not process test orders as it would have during the normal course of business. Rather, these orders were identified as test orders and processed with special management supervision. Such actions should not be condoned as they undermine the integrity of the Georgia test results as a whole.[79]

Thus, it is highly likely that the quality of performance will drop if BellSouth is given 271 authority in these two states. BellSouth will then place priority on orders for states in which Section 271 review is pending, and the quality of service in Georgia and Louisiana will suffer.

C. The Stages of BellSouth OSS

In this section we focus on specific deficiencies in the various stages of BellSouth's OSS.

1. Pre-Ordering

The pre-ordering stage encompasses those activities that a carrier undertakes to gather and verify the information needed to place an ILEC service order to accommodate a customer's requirements. Before the CLEC can even begin to place the order, the CLEC must determine what the ILEC is able to provide. The CLEC operates at an information disadvantage vis-a-vis the ILEC, whose database already indicates what services can be provided to a particular end-user, and the CLEC must overcome this disadvantage quickly to retain the customer. As the Commission has noted:

> [g]iven that pre-ordering represents the first exposure that a prospective customer has to a competing carrier, it is critical that inferior access to the incumbent's OSS

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78 *Georgia PSC 271 Order* at 122, *citing, AT&T September 12, 2001 Petition* at 5.

79 *DOJ Evaluation* at 5, n. 14 (citations omitted).

> does not render the carrier a less efficient or responsive service provider than the incumbent.[80]

The general standard that this Commission has applied to the pre-ordering stage in the context of its Section 271 evaluations is that the BOC must demonstrate that "it provides requesting carriers access that enables them to perform these functions in substantially the same time and manner as [the BOC's] retail operations."[81] The Commission has previously emphasized that "providing pre-ordering functionality through an application-to-application interface is essential in enabling carriers to conduct real-time processing and to integrate pre-ordering and ordering functions in the same manner as the BOC."[82] It is not enough, however, that the CLEC have access to the same information as does the BOC. Rather the CLEC must also have the ability to retrieve this information and process the information on terms and conditions at parity with those applied to the ILEC's retail services.

CLECs also have been experiencing problems in regard to accessing pre-ordering information. Birch noted in the prior proceeding that BellSouth's primary OSS is the Telecommunications Access Gateway ("TAG"). Birch chronicled 30 incidents of TAG failures that were not reported in BellSouth's outage reports.[83] This data is coupled with the outages in the LENS interface that CLECs have been experiencing.[84] As the Department of Justice found:

> CLECs operating in the BellSouth region complain of significant service outages, including slow or degraded service. By contrast, BellSouth reports virtually no

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[80] *Bell Atlantic New York 271* Order at ¶ 129.

[81] *Id.*

[82] *Id.*

[83] *Birch Comments* at 30.

[84] *US LEC Initial Comments* at 28.

> downtime for any of its interfaces for June, July, and August, despite the fact that at least one CLEC could place only a fraction of the orders it usually submits.[85]

As the Department of Justice goes on to note, "when electronic interfaces are unavailable to CLECs, they cannot submit orders for new customers or initiate changes to existing services via those interfaces or use them to access information needed to respond to customer inquiries."[86] Nothing in the supplemental application provides assurance against continuing TAG outages.

CLECs use electronic interfaces to perform pre-ordering and ordering functions. Thus, these periods of inaccessibility render CLECs incapable of processing orders. As SECCA pointed out:

> LENS outages interfere with a CLEC's ability to service new customers or customer prospects. The ability to order resold services, verify customer information, pull customer service records and make feature changes is suspended. EDI outages make it impossible to even order UNEs to serve new customers. Delays attributable to EDI outages can cause a CLEC to miss a committed installation date for a new customer.[87]

CLECs have also experienced an apparent breakdown of the firewall between the LENS system and the retail side of BellSouth. Customers who have not been contacted by BellSouth in recent history are often contacted within hours of a CLEC requesting a CSR. This is a violation of the Interconnection Agreements and the spirit of the Telecommunications Act. A more complete discussion of this problem is contained below in the Public Interest discussion.

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[85] *DOJ Evaluation* at 26.

[86] *DOJ Evaluation* at 13.

[87] *SECCA Georgia PSC Reply Comments* at 12.

2. Ordering

This Commission has previously focused on "flow-through" rates as an indication of parity in the ordering stage.[88] "Flow-through" refers to orders that are transmitted electronically through the gateway and accepted into the ILEC's back office ordering systems without manual intervention. The flow-through rate often "serves as a yardstick to evaluate whether an incumbent LEC's OSS is capable of handling reasonably foreseeable commercial volumes of orders."[89] In addition, this Commission has focused on an ILEC's "overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems."[90]

AT&T observed in the prior proceeding that more than 25% of all electronically submitted LSRs fall out for manual processing "because of design decisions by BellSouth or BellSouth system errors."[91] This is in contrast to the nearly 100% flow-through capability of BellSouth's own retail operations.[92] The situation was so dire that the Georgia PSC had to order "the creation of an Improvement Task Force to expand the scope of CLEC electronic ordering and eliminate BellSouth system errors and designed manual fallout."[93]

AT&T stated the flow-through rates in Louisiana are inadequate as well.[94] Staff of the LA PSC conceded there were problems, noting:

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[88] *Bell Atlantic New York 271* Order at ¶ 160, fn. 488, ¶ 162, fn. 496.

[89] *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, 13 FCC Rcd 12817, 12850 (1998).

[90] *Id.* at ¶ 163.

[91] CC Docket No. 01-277, Comments of AT&T Corporation, ("*AT&T Comments*") (Oct. 19, 2001) at 21.

[92] *Id.* at 22.

[93] *AT&T Georgia PSC Comments*, Item 2, at 5.

[94] *Louisiana PSC Staff Recommendation* at 57.

> Performance in the UNE category is close to meeting expectations, but performance in the business category needs improvements. The benchmark for business flow-through is 90% (in Louisiana it is 80% for an interim period of 6 months and then increases to 90%). Performance results for April, May and June are 61.25%, 60.15%, and 57.26%, respectively. The benchmark for UNEs is 85% (in Louisiana it is 80% for an interim 6 month period and increases to 90% thereafter.) Performance in this area for April, May, and June was 79.25%, 74.87% and 78.33% . . . .[95]

Once again, flow-through is a problem that concerned the Commission in the *Second Louisiana Order*.[96] This lack of flow-through and increased manual processing of orders has harmed CLECs. When an order is processed electronically, it takes, on average, 15 minutes for the CLEC to receive a FOC or reject notice. When the order falls out of the electronic processing and is handled manually, it takes, on average, 12 hours for BellSouth to provide a reject notice and at least 18 hours to provide a FOC.[97] BellSouth must return 97% of mechanized rejects within one hour, but if the order falls out of electronic processing, it must only return 85% of manually processed rejects within 10 hours.[98] Thus, while BellSouth can provide delivery information to its customers in real time, CLECs will have to wait to provide such information.

CLECs have to expend additional resources to determine the status of the manually processed orders and the manual processing heightens the risk of error. Manually processed orders also get later due dates since due dates are not confirmed until a FOC is generated.[99] Manual processing is clearly problematic in that it will increase costs CLECs face, and decrease

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[95] *Id.* at 58.

[96] *Second Louisiana Order* at ¶ 58.

[97] *AT&T Georgia PSC Comments*, Item 2, at 4.

[98] CC Docket No. 01-277, Comments of WorldCom, Inc. ("*WorldCom Comments*") (Oct. 22, 2001) at 17; *see also, DOJ Evaluation* at 20.

the quality of service they can provide. Customers will be reluctant to change carriers if such a change is not processed in a timely and seamless manner. Given the concerns about scalability of BellSouth's OSS, the problem may be exacerbated with increasing commercial volumes of orders.

Even though BellSouth claims to have fixed the problems associated with the accuracy of manual order processing, BellSouth relies on a single month of data to support its claim that it satisfies the performance measurements for service order accuracy.[100] Given BellSouth's deplorable levels of performance prior to the one month it claims to have satisfied the performance standard, the Commission must insist upon a demonstration of repeated compliance with the standard. Without a greater sample of monthly reports, it is reasonable to conclude that the single month cited by BellSouth was an aberration and BellSouth can be expected to revert to poorer levels of performance. That BellSouth has agreed to pay state penalties on performance misses is certainly a step in the right direction, but it is insufficient at this time to demonstrate compliance with its nondiscriminatory provisioning obligations.

In addition, CLECs have been experiencing difficulties in ascertaining the status of their orders. There are three types of notifications that a CLEC receives in regard to an order – acknowledgments, confirmation, and rejects. Acknowledgments state that the order has been received; confirmations tell the CLEC that the order will be performed on a specific date; and rejects notifies the CLEC that the order cannot be processed and gives the reason. CLECs have been experiencing problems in getting timely FOCs and reject notices.

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[99] *Id.* The concern over CLEC access to due dates resulting from delays in returning FOCs due to excessive manual processing of orders was one raised by the Commission in its *Second Louisiana 271 Order*. *Second Louisiana 271 Order* at ¶ 104.

[100] CC Docket No. 02-35, Supplemental Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Georgia and Louisiana (Feb. 14, 2002) ("*BellSouth Supplemental Brief*") at 26.

BellSouth's historical performance in this area has been woeful.[101] KPMG created an exception for missing notifiers in its third-party testing in Georgia because BellSouth did not send a completion notice on 14% of EDI orders and 16% of TAG orders for which KPMG expected a completion notice.[102] Despite this high failure rate, KPMG mysteriously closed this exception without adequate explanation.[103] KPMG has also opened an exception on this in Florida.[104] As WorldCom astutely noted in the prior proceeding, unless this issue is resolved, when commercial volumes increase, the amount of missing notifiers will increase.[105] This is what happened in New York, and the same potential exists in Georgia.[106]

When BellSouth actually issues the notifiers, they are often late.[107] Many orders are also erroneously rejected.[108] BellSouth often "rejects a significant amount of CLEC orders that it should accept for processing."[109] WorldCom noted before that it has experienced a much higher reject rate from BellSouth as compared to other BOCs.[110] It is therefore puzzling how the Georgia PSC could conclude that the fact that "BellSouth has failed to return some FOCs or reject notices in a timely manner 'appears to have little competitive impact.'"[111]

An issue that was particularly of concern to this Commission is whether BellSouth provides equivalent access to due dates. The Commission stated that it would closely examine

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[101] *See US LEC Initial Comments* at 33-34.

[102] *WorldCom Comments* at 10.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 9-10.

[107] *See Georgia PSC 271 Order* at 73 (noting AT&T and NewSouth claims about untimely FOCs).

[108] *Id.* at 74 (noting AT&T, WorldCom, and KMC problems with rejected orders).

[109] *DOJ Evaluation* at 19.

[110] *WorldCom Comments* at 28.

this issue in future BellSouth applications.[112] AT&T noted in the prior proceeding "that BellSouth *still* fails to provide CLECs with a 'due date calculator' that accurately and reliably provides due dates."[113] Instead, CLECs "get due dates that are often erroneous and far later than those requested by CLECs – ensuring that CLEC customers will often receive service at a later time than those requested by CLECs."[114] The Georgia PSC conceded that there could be problems with obtaining due dates on orders that fall out for manual handling. The Georgia PSC concluded, however, that service requests that fall out for manual handling are impacted the same with respect to due dates whether they originate from a BellSouth retail customer or a CLEC customer."[115] The Georgia PSC concluded that "this does not result in discrimination."[116] However, as shown above, BellSouth's retail division experiences much better flow-through so CLECs and their customers are adversely impacted.

Clearly there are pervasive problems with BellSouth's OSS. These problems coupled with the lack of overall functionality and capacity of BellSouth's OSS are cause for tremendous concern. The Commission must be very careful in regard to pronouncements it makes regarding BellSouth's OSS in this application since BellSouth will attempt to bootstrap any findings made in this application to its future applications much as Verizon and SBC did with the New York and Texas findings. The pervasive OSS problems, coupled with the questions about the integrity of the performance data, demonstrate that the Commission should not find checklist compliance regarding OSS for this application. Unlike New York and Texas, Georgia is not the most

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[111] *Georgia PSC 271 Order* at 98.

[112] *AT&T Comments* at 21, *citing*, *Second Louisiana Order* at ¶ 106.

[113] *AT&T Comments* at 21 (emphasis in original).

[114] *Id.*

[115] *Georgia PSC 271 Order* at 89.

[116] *Id.*

populous state in the BellSouth region, and the Georgia OSS evaluation is lacking in significant areas. As the Department of Justice observed:

> Although the Georgia KPMG test provides some evidence of the functionality and operability of BellSouth's OSS, the test has significant limitations. First, the Georgia test was limited in scope. Although the Commission ultimately required some additional testing and other improvements, a number of key areas remained outside the parameters of the test. Second, unlike in New York, in Georgia KPMG did not draft the Master Test Plan. Third, a number of Georgia test 'exceptions' appear to have been closed without adequate verification that the problems have been resolved. Finally, KPMG has not completed the metrics testing ordered by the Georgia PSC.[117]

Among key areas not evaluated were "maintenance and repair and billing work centers" and "training account team personnel."[118] Given the problems US LEC and XO have experienced in regard to maintenance and repair, as well as difficulties with escalation of problems, these omissions in testing are very troubling.[119]

BellSouth's OSS performance in Florida would provide much better insight into the adequacy of BellSouth's OSS. The Commission should refrain from making any conclusions about BellSouth's OSS until it considers that application. The Florida test gives the third-party tester more independence, has broader participation by affected CLECs, and "has been substantially more comprehensive and rigorous than the testing conducted in Georgia."[120] The Florida evaluation is looking at aspects of BellSouth's OSS that the Georgia review disregarded. Of the 94 open exceptions and observations in the Florida test as of October 5, 2001, 64% cover matters that were not tested in Georgia.[121] The Florida test is also uncovering serious

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117 *DOJ Evaluation* at 5.

118 *Id.*

119 *See* Affidavit of Kristen Hudson, *XO Reply Comments.*

120 *AT&T Comments* at 18.

121 *Id.*

deficiencies that were closed out in Georgia.[122] If BellSouth attempts to rely on region-wide OSS, then it must demonstrate that these open issues in Florida have been adequately addressed and resolved. As the Department of Justice noted, "requiring BellSouth to provide nondiscriminatory access to its OSS before this application is granted is important particularly because its first successful filing may well serve as the benchmark for evaluation of its OSS in states regionwide." [123] The Department of Justice went on to conclude:

> The Florida test is broader in scope and promises to provide a more robust assessment of BellSouth's OSS than did the Georgia OSS test. Indeed, KPMG's OSS test is identifying problems that were not detected during the Georgia OSS test – problems that BellSouth is working to fix. The Commission should be attentive to information generated by the Florida test as well as information about BellSouth's ability or willingness to fix any problems identified in Florida.[124]

The Commenters urge the Commission to take this a step further. Given BellSouth's insistence that its OSS is region-wide, the Commission should wait until the Florida PSC has given BellSouth's OSS a passing grade and BellSouth has fixed all the problems identified in the Florida test. The Florida PSC intends to release its ruling on the Florida OSS testing on June 17, 2002.

In addition to the OSS required by the Act for processing of LSR-based orders, CLECs also utilize another BellSouth system, CAFÉ, to process Access Service Requests – orders for the special access facilities discussed above. BellSouth implemented the CAFÉ system in December 2000 to replace an aging BDS-TELIS system. The CAFÉ system also experiences outages and fails to communicate properly with BellSouth's internal systems that process ASRs.

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[122] *Id.*

[123] *DOJ Evaluation* at 3.

[124] *Id.* at 7.

V. BELLSOUTH DOES NOT COMPLY WITH CHECKLIST ITEM 13

Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[125] The Commission has noted that in regard to reciprocal compensation requirements under Checklist Item 13, a BOC is required to follow "states' interpretations and requirements promulgated under their interpretation of interconnection agreements, including states' requirements concerning ISP-bound traffic."[126]

The April 2001 reevaluation by the FCC of the proper treatment of intercarrier compensation of telecommunications traffic delivered to Internet service providers ("ISPs") does nothing to alter the tenor of this Commission's rulings with respect to a BOC's reciprocal compensation obligations in regard to existing interconnection agreements.[127] The FCC explicitly stated that its determination does not "alter existing contractual obligations," and "does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."[128]

BellSouth has not met its reciprocal compensation obligations under Georgia PSC-approved interconnection agreements. US LEC entered into a series of interconnection agreements with BellSouth in Georgia, and under all those agreements it was forced to litigate to

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[125] 47 U.S.C. § 271(c)(2)(B)(xiii).

[126] *Verizon Massachusetts 271 Order* at ¶ 215.

[127] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. April 18, 2001) (the "*FCC Reciprocal Compensation Order*").

[128] *Id.* at ¶ 82.

receive reciprocal compensation payments for ISP-bound traffic.[129] The first Interconnection Agreement ("First Agreement") was entered into on November 12, 1996, and the second was effective November 1, 1998 ("Second Agreement"). The Georgia PSC found that both the first and second agreements require that reciprocal compensation be paid for ISP-bound traffic.[130]

> BellSouth, however, continued to refuse to provide reciprocal compensation for ISP-bound traffic. This refusal was maintained despite the unequivocal language of this Commission's orders not only in Docket No. 9577-U, but in the face of the orders in other related proceedings.[131]

There have been four other orders of the Georgia PSC concluding that ***all*** local traffic, including traffic terminating at ISPs, is subject to the reciprocal compensation.[132] As the Georgia PSC noted in the *US LEC Decision*:

> [T]his Commission has established a long line of similar rulings and found that ISP traffic is subject to the reciprocal compensation provisions of several interconnection agreements. The Commission has rejected the same arguments that BellSouth makes here on four separate occasions and those orders have been upheld by the United States District Court for the Northern District of Georgia.[133]

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[129] *See Complaint of US LEC of Georgia, Inc. against BellSouth Telecommunications, Inc. and Request for Immediate Relief*, Ga. P.S.C. Docket No. 9577-U.

[130] *Complaint of US LEC of Georgia, Inc. Against BellSouth Telecommunications, Inc. and Request for Immediate Relief*, Ga. P.S.C. Docket No. 9577-U, Order at 22 (June 16, 2000) ("*US LEC Decision*").

[131] *Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc.*, Docket No. 9920-U, Order Deciding Complaint (Ga. P.S.C. 1999)("*Intermedia Decision"*).

[132] Complaint of MFS Intelenet of Georgia, Inc. Against BellSouth Telecommunications, Inc. and Request for Immediate Relief, Docket No. 8196-U, Order Affirming and Modifying the Hearing Officer's Decision (Ga. P.S.C. Dec. 28, 1998) (the "MFS Decision"); In Re: Petition of MCImetro for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc., Docket No. 6865-U, Order Deciding Complaint (Ga. P.S.C., Dec. 28, 1998) (the "MCImetro Decision"); Complaint of e.spire Communications, Inc. Against BellSouth Telecommunications, Inc., Docket No. 9281-U, Order Affirming and Modifying the Hearing Officer's Decision (Ga. P.S.C., March 3, 1999)(the "e.spire Decision"); *Complaint of Intermedia Communications, Inc. against BellSouth Telecommunications, Inc.*, Docket No. 9920-U, Order Deciding Complaint (Ga. P.S.C. 1999)("Intermedia Decision").

[133] *US LEC Decision* at 14; *see, e.g., BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 97 F.Supp.2d 1363 (May 3, 2000)(finding Ga. P.S.C. interpretation of interconnection agreement as to reciprocal compensation obligations for ISP-bound traffic to be reasonable).

This Commission reaffirmed that its conclusions that ISP-bound traffic is subject to reciprocal compensation were "general conclusions not limited to the circumstances of the contract in the case, and that these conclusions shall have precedential effect."[134]

The Georgia PSC has stated that:

> [T]he Commission also finds, however, that the terms of the contract at issue in this case require the parties to pay reciprocal compensation for ISP traffic. This finding is separate and independent from the Commission's findings that ISP traffic is jurisdictionally intrastate. Indeed, even assuming that the FCC maintains its conclusion on the jurisdictional question, and does so in a manner that satisfies the Bell Atlantic court, this Commission would still find that the interconnection agreements at issue in the case require reciprocal compensation for calls made to ISPs.[135]

Thus, there was no clear basis for BellSouth to deny US LEC payment for the amounts due and owing. BellSouth openly refused to follow "states' interpretations and requirements promulgated under their interpretation of interconnection agreements, including states' requirements concerning ISP-bound traffic." The fact that US LEC had to litigate for years to get BellSouth to adhere to these requirements demonstrates BellSouth's failure in regard to Checklist Item 13.

XO, US LEC, and other CLECs have also been forced to litigate whether it can bill BellSouth at the tandem interconnection rate. XO's and US LEC's switches clearly perform functions similar to those performed by BellSouth's tandem switches, and the switches serve comparable geographic areas. Despite this, BellSouth refused to pay the tandem rate. In May 2001, the Georgia PSC ordered BellSouth to compensate US LEC at the tandem rate.[136] As the Georgia PSC noted:

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[134] *Id., citing, MFS Decision* at 9.

[135] *US LEC Decision* at 15-16.

[136] Georgia PSC Docket No. 9577-U, Order on Tandem Interconnection Rate at 9 (May 21, 2001)

> US LEC's point that duplication of the BellSouth architecture is contrary to the spirit of the Telecommunications Act is persuasive. The purpose of the Telecommunications Act is to promote innovation and competition in the telecommunications industry. To require US LEC to mimic BellSouth's architecture could discourage competing carriers from investing in state-of-art facilities in the State. Moreover, BellSouth admitted that a carrier utilizing a Lucent 5ESS switch with the proper software and a SONET ring architecture is able to provide the same call transport and termination capability to end users as BellSouth's architecture of tandem and end office switches.[137]

Given this admission, it is hard to conceive why US LEC was forced to litigate this issue. Moreover, even in the face of the Georgia PSC decisions in favor of US LEC, BellSouth immediately filed an appeal with both the Superior Court of Fulton County and the United States District Court for the Northern District of Georgia. Without informing US LEC of its intention to do so, BellSouth paid the funds awarded by the Georgia PSC into an escrow account with the Court. It was only in the context of a settlement with BellSouth in October 2001 – 14 months after the funds were due and payable to US LEC – that the funds were released to US LEC.

In its continuing efforts to shirk its reciprocal compensation obligations to CLECs, BellSouth has also required XO to arbitrate this identical issue before the Georgia PSC, even though XO has deployed a Nortel DMS 500 switch, which is equivalent to and compatible with the Lucent 5ESS switch, with the proper software and a SONET ring architecture.[138] BellSouth's position on this matter is indefensible, yet it has required XO to invoke the authority of the Georgia PSC to compel BellSouth to comply with its regulatory obligations.

[137] *Id.* at 7.

[138] *Petition of XO Georgia, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996*, Docket No. 14360-U (filed Aug. 17, 2001) at 13.

Clearly BellSouth has used litigation as a way to forestall and avoid its legal obligations,[139] particularly in regard to reciprocal compensation. Accordingly, the Commission should deny BellSouth's application for failure to comply with Checklist Item 13.

VI. BELLSOUTH'S APPLICATION IS NOT IN THE PUBLIC INTEREST

A. The Standard

Under Section 271(d)(3)(C) of the Act, the Commission may not grant Section 271 authorization unless it is consistent with the "public interest, convenience and necessity."[140] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[141] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[142] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."[143] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that

[139] BellSouth has also compelled CLECs, including XO and US LEC, to litigate the issue of charges for SS7 messages. *See BellSouth Telecommunications, Inc.'s Revisions to Its General Subscriber Services Tariff to Introduce a New Intrastate Access Service Offering Called BellSouth CCS7 Access Arrangement*, Docket No. 14877-U (Ga. PSC). SS7 functionality allows faster dialing or "quick call set-up" because it checks to make sure the line is open. It is also used in network management. SS7 messages are used on virtually every single phone call. No ILEC has ever charged CLECs for SS7 messages.

[140] 47 U.S.C. § 271(d)(3)(C).

[141] *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

[142] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[144]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[145] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[146] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[147]

Predictably, the BOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.[148] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.[149] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the

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143 *Id.* at n. 992, *quoting,* S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

144 *Id.*

145 *Ameritech Michigan 271 Order* at ¶ 383.

146 *Id.* at ¶ 385.

147 *Id.*

148 *Second Louisiana Order,* at ¶ 361.

149 *Id.*

relevant local exchange market), rather than just the in-region, interLATA market."[150] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[151] As the Department of Justice notes, in-region interLATA entry by a BOC should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[152]

Senators Burns, Hollings, Inouye, and Stevens reaffirmed the importance of the public interest standard in a letter to Chairman Powell.[153] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[154]

The Commission has traditionally focused on both the current state of competition in a particular market and assurances of future compliance to ensure future competition in evaluating the public interest standard.[155]

Despite this clear language, BellSouth is still attempting to subsume the public interest analysis under considerations of checklist compliance. The Commission should once again

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150 *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

151 *Ameritech Michigan 271 Order* at ¶ 386.

152 *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

153 Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001).

154 *Id.* at 3.

155 *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, (Jan. 22, 2001) ¶¶ 266-281 ("*SWBT Kansas/Oklahoma 271 Order*").

unequivocally reject this overture. The Commission has given applicants substantial latitude in demonstrating checklist compliance. The Commission has allowed applicants to incorporate interconnection terms and conditions,[156] rates,[157] and even performance data[158] from another state to demonstrate checklist compliance in a particular state. The Commission has also increasingly allowed applicants to rely on promises of future compliance.[159] As a result, the checklist has increasingly become a formula where if the applicant can plug in the correct inputs it can obtain Section 271 authority. As Sprint has noted:

> [I]t is time that the Section 271 process go beyond the mechanistic exercise that it has become, where substantial problems are pigeonholed away, where BOC submissions are deemed 'close enough' (though their departure from prior standards grows larger with each application), where procedures are sacrificed to expediency and where monetary fines are deemed sufficient for filing false statements before the Commission. This is not at all what Section 271 should be about.[160]

The Commission has determined that this latitude is warranted. The Commenters are not here to second-guess that determination, but to merely reiterate that this is all the more reason for a viable public interest standard. With some 2,000 metrics to consider, it is inevitable that the process will only continue to grow more mechanistic. As checklist compliance becomes all the more mechanistic, it is all the more important that a viable public interest standard be preserved.

The public interest standard will enable the Commission to look beyond the numbers and look at the qualitative aspects of the application. The Commission will be able to consider if the application, when looked at as a whole, truly promotes competition and is in the public interest.

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[156] *SWBT Kansas/Oklahoma 271 Order* at ¶ 35.

[157] *See id.* at ¶ 82, n. 244.

[158] *See id.* at ¶¶ 35-38.

[159] *See, Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 8 (September 19, 2001).

For instance, the Georgia Consultative Report is replete with references to missed metrics that the Georgia PSC did not deem to be competitively significant.[161] Assuming *arguendo* that those missed metrics individually were not competitively significant, when combined they do take on a competitive significance.

Promoting CLEC market entry should be a paramount goal of the Commission. Competitive entry into local markets promotes increased choices for end users and promotes innovation and demand for services. For instance, CLECs have fueled the growth of advanced services and broadband deployment by deploying state-of-the-art networks.[162] Prior to competitive entry, the BOCs were disinterested in advanced services and broadband deployment; now they fill airwaves advocating greater broadband deployment. The Act was intended to provide for a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[163] The goal of promoting competition was to "secure lower prices and higher quality services for American telecommunications consumers."[164] As the House Commerce Committee Report noted:

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[160] *Sprint Comments* at 22.

[161] *See, e.g., Georgia PSC 271 Order* at 90 (pre-ordering response time for HAL/CRIS access via LENS interface is longer for CLECs but "difference has not materially impacted the competitiveness of the Georgia local market."); *Id.* at 98 ("That BellSouth has failed to return some FOCs or reject notices in a timely manner appears to have little competitive impact."); *Id.* at 156 ("Difference in average completion interval for unbundled loops loses competitive significance as a result of the study."); *Id.* at 158 (BellSouth's miss of the retail analogue for percent provisioning troubles within 30 days for xDSL<10 circuits is "competitively insignificant.")

[162] *See Sprint Comments* at 10, n. 18.

[163] P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996).

[164] P.L. 104-104, H.R. Rep. 104-204(I) at 160 (1995).

> Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.[165]

Competitive entry into markets has helped make the goals a reality, and the Commission has played a significant role in effecting these goals. The Commission, however, cannot ignore those goals now.

The Commission cannot deny that local competition is imperiled and that competitive exit from local markets is not in the public interest. CLECs provide the only hope for intramodal competition in local markets as BOCs have been refusing to compete in each other's regions. In the prior proceeding, Sprint bemoaned the "dearth of competition between the RBOCs" and is "unaware that any such competition exists on a significant scale today."[166] AT&T suggested that it appears that Qwest has signed an agreement not to compete for business customers in BellSouth's region.[167] With the long distance industry evidencing "substantial decline of . . . industry stalwarts,"[168] and the increasing possibility that one of the large three long distance carriers, perhaps even AT&T, will be purchased by a BOC, the vision for the 21st century is fast becoming a return to the pre-1980s America.

The 1996 Act was designed to provide end users with a number of competitive choices and services. As Commissioner Copps has stated:

> The combination of competitive BOC entry into the interLATA market and competitive local exchange carrier (CLEC) entry into the BOC's once-dominant local market, Congress believed, would lead to significant consumer benefits in the form of lower prices, better service, and investment in new technologies. Continued BOC dominance of a state's local market, however, could undermine

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165 *Id.*

166 *Sprint Comments* at 9.

167 *AT&T Comments* at 81.

168 *Sprint Comments* at 8.

> consumer benefits if the BOC could leverage this dominance upon entering the interLATA market.[169]

If the Commission allows the Section 271 process to continue to be diluted, end users will be seeing a landscape dominated by the BOCs each seeking to maintain their monopolies in their regions. The Commission was given the ability to prevent such a scenario through use of the public interest standard. The Commission should employ this standard to ensure that local markets are irreversibly open to competition.

B. The Current State of Local Competition

BellSouth may obtain authority to provide long-distance service only when competition has rendered its local markets irreversibly open. BellSouth's own conduct demonstrates that has not happened. Further, BellSouth's evidence of CLEC market share in Georgia and Louisiana is contradicted by the Commission's data. There are numerous factors that have contributed to the lack of competitive entry in the Georgia market. Mr. Gillan noted in the Georgia PSC proceeding:

> [T]here are a number of reasons why UNE-based competition has failed to develop significantly. The first is that BellSouth has been very slow to provide access to network combinations, delaying availability of this important strategy until February of last year. Consequently, the most influential form of UNE-based competition – that is entry using the UNE-Platform – was delayed for approximately four years by BellSouth's refusal to offer its legal obligation. Second, certain UNE rates remain excessive . . . not even *BellSouth* could afford to offer service in Georgia if it had to lease UNEs and purchase call detail records to do so.[170]

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[169] *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 1 (September 19, 2001).

[170] *Gillan Affidavit* at ¶ 17.

1. BellSouth's Ability to Raise Prices for Special Access is Prima Facie Evidence of a Lack of Local Competition

In December 2000, BellSouth was granted pricing flexibility for special access services in 39 metropolitan statistical areas, including Atlanta, Augusta, Columbus, and Savannah, Georgia, and Baton Rouge, Lafayette, Lake Charles, Monroe, and New Orleans, Louisiana.[171] As the CLEC community predicted, BellSouth has raised prices for special access in areas where it has been granted pricing flexibility. Within a year, BellSouth instituted wide-ranging price increases for key special access services so that prices for these products in areas where BellSouth has been granted pricing flexibility are significantly higher than in other areas. For example, BellSouth now charges $168.00 per month for a DS-1 local channel in Zone 1 in areas where it has obtained pricing flexibility, whereas it charges $150.00 for this in areas where it has not obtained pricing flexibility. Because of these nearly across-the-board rate increases, BellSouth now charges in areas where it has obtained pricing flexibility higher amounts in every pricing zone for DS-1 local channels, Interoffice Channel (fixed), Interoffice Channel (mileage), and Channelization (DS-1 to DS-0) than in areas where it has not obtained pricing flexibility. The only exception is for Interoffice Channel-mileage in Zone 3, where the price is the same in areas where BellSouth has, and has not, obtained pricing flexibility. BellSouth also has higher rates in areas where it has obtained pricing flexibility for a number of components of its term commitment plans, and its fiber ring services.[172] Clearly, BellSouth faces little or no competition

[171] *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, 15 FCC Rcd 24588 (2000), n.25.

[172] These rate differences were provided with US LEC's comments opposing Verizon's petition for special access pricing flexibility. Joint Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp., *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27 (Dec. 14, 2001).

in the markets where it has been granted pricing flexibility as evidenced by its ability to raise prices.

2. BellSouth's Estimate of CLEC Market Share is Flawed

Further, BellSouth's own evidence regarding the state of local competition is contradicted by a recent report of the Commission. BellSouth contends that CLECs with more than 10 lines serve between 18.5% and 18.8% of the local access lines in BellSouth's service area in Georgia.[173] Yet this figure is significantly higher than the CLEC market share estimated by the Commission. In the most recent competitive industry report, the Commission stated that CLECs served only 10% of the access lines in the state.[174] There are no plausible arguments to account for the significant discrepancy between 18% and 10%.

In particular, the FCC reports that CLECs serve a total of 515,730 access lines in Georgia.[175] BellSouth contends that CLECs serve a total of 894,160 access lines. BellSouth's figure is 73% higher than the FCC's. This discrepancy could not reasonably be attributable to growth between the FCC's reporting period (June 2001) and BellSouth's (December 2001). Unless CLECs saw 73% growth over six months, BellSouth's calculation is fundamentally flawed. Given that the CLEC industry has been severely disrupted by the loss of access to capital markets in 2001, 73% growth over six months is simply fantasy. BellSouth's estimate of CLEC market share in Georgia cannot be taken seriously.

Likewise, BellSouth contends that CLECs with more than 10 lines serve between 8.9% and 10% of the local access lines in BellSouth's service area in Louisiana.[176] Yet this figure is

[173] *BellSouth Supplemental Brief,* Stockdale Supplemental Affidavit at 2.

[174] Local Telephone Competition, Status as of June 30, 2001, Table 6 (Feb. 2002).

[175] *Id.*, Table 6.

[176] *BellSouth Supplemental Brief,* Stockdale Supplemental Affidavit at 2.

also significantly higher than the CLEC market share estimated by the Commission. In the same competitive industry report, the Commission stated that CLECs served only 4% of the access lines in Louisiana.[177] Again, there are no plausible arguments to account for the significant discrepancy between 10% and 4%.

In particular, the FCC reports that CLECs serve a total of 108,820 access lines in Louisiana.[178] BellSouth contends that CLECs serve a total of 255,504 access lines. BellSouth's figure is 135% higher than the FCC's. Again, unless CLECs saw 135% growth in Louisiana between June 2001 and December 2001, BellSouth's estimate of CLEC market share in Louisiana cannot be taken seriously either.

While the Commission has not required a BOC to show a loss of a specific percentage of its market share, it has found data on the "nature and extent of actual local competition" to be relevant to its public interest inquiry.[179] If there is a lack of competitive entry then the Commission will examine if this lack of entry is due to "the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason."[180]

3. Anticompetitive "Win-Back" Practices Harm Local Competition

Another significant factor impeding the development of local competition and demonstrating that BellSouth's Application is not in the public interest has to be the anticompetitive "win-back" practices in which BellSouth engages. As KMC notes:

> As part of its "win-back" program, BellSouth sends sales representatives to customers who have decided to switch to KMC. In so doing, BellSouth employs

[177] Local Telephone Competition, Status as of June 30, 2001, Table 6 (Feb. 2002).

[178] *Id.*, Table 6.

[179] *Ameritech Michigan 271 Order* at ¶ 391.

[180] *Id.*

> various questionable tactics to entice end users, including waiver of fees for certain services, monetary, credits, and non-tariffed rates. In at least one instance, BellSouth presented a KMC customer with a list of BellSouth customers it had allegedly won back – claiming they returned to BellSouth due to poor KMC service.[181]

In addition, it appears that:

> BellSouth is apparently using proprietary information obtained from KMC through the BellSouth wholesale unit for the benefit of its retail units. BellSouth's reaction to customer switches is practically instantaneous, following almost immediately the submission by KMC of an order to switch an end user customer. KMC customers report that, after not hearing from BellSouth for years, they suddenly receive a call and/or visit right after making the decision to switch to KMC.[182]

ITC^DeltaCom noted that a BellSouth representative contacted one of its prospective customers and impugned ITC^DeltaCom's financial stability and its service quality and implied that it is promising service and value that is not always provided.[183] IDS Telecom noted that BellSouth's "win-back" telemarketing campaigns targeting its customers occurred "during or immediately after" IDS customers experienced BellSouth caused service disruptions. BellSouth telemarketers also told IDS customers that IDS "was going out of business" or "ready to declare bankruptcy."[184] ACCESS Integrated Networks stated that BellSouth sales reps advised its customers that ACCESS was bankrupt and that customers should switch their service back to BellSouth to avoid losing service.[185] US LEC customers have experienced similar conduct. Based on these complaints, the Georgia PSC ordered BellSouth to refrain from "win-back" activities until seven days after the customer switches service. It also prohibited BellSouth from

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[181] *KMC Georgia PSC Comments* at 10.

[182] *Id.* at 10.

[183] *Georgia PSC 271 Proceeding,* Comments of ITC^Deltacom, Inc., Exhibit 2 (May 31, 2001).

[184] *Id.*

[185] *Georgia PSC 271 Proceeding,* Comments of Access Integrated Networks, Inc., at 21 (May 31, 2001).

inserting marketing materials in the final bill it sends to customers that have switched service. Staff of the Louisiana PSC has recommended similar measures in Louisiana.[186] The South Carolina Commission issued a 10-day moratorium on win-back activities on October 17, 2001.

It has also come to light that in 2001, BellSouth was providing a customer win-back program throughout its region, including Georgia and Louisiana, that provided certain customers that had monthly telephone bills in excess of $250 with three months of free local service, and discounts on other regulated products.[187] The customers targeted in the program just happened to be customers of CLECs. BellSouth has acknowledged that the program was a targeted win-back for customers that had left BellSouth.[188] Moreover, at the time that the offer of three months of free local service was available to customers of CLECs, BellSouth told the Tennessee Regulatory Authority ("TRA") that it had "no [marketing] programs that were specifically aimed at regaining former BellSouth customers."[189] Further, the substantial discounts on regulated services available to former customers of BellSouth were not made available to wholesale customers of BellSouth, including CLECs.[190] The free local service offer was not even tariffed.[191]

XO Tennessee, Inc., an affiliate of XO, was one of two CLECs that filed a complaint with the TRA regarding the practice. Under Tennessee law, it is illegal for BellSouth to offer

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[186] *Louisiana PSC Staff Recommendation* at 21.

[187] *Complaint of XO Tennessee, Inc. against BellSouth Telecommunications, Inc.; Complaint of Access Integrated Networks, Inc. against BellSouth Telecommunications, Inc.,* Docket No. 01-00868 (Tenn. Reg. Auth.) ("*XO/ANI Complaint*").

[188] *XO/ANI Complaint,* Transcript of Proceedings, Monday, February 4, 2002 ("*TRA Transcript*") at 162, 243.

[189] *Id.* at 244.

[190] *Id.* at 250.

[191] *Id.* at 59.

rebates to some customers that are not available to all customers.[192] Indeed, one reason carriers are required to file tariffs is to preclude these types of discriminatory special deals.[193] Although the complaint was filed in Tennessee, the BellSouth free local service program was available throughout the BellSouth region, including Georgia and Louisiana.[194] BellSouth has stated that it terminated the free-service program, but only after the complaints in Tennessee had been filed.[195] The matter went to hearing on February 4, 2002, and the matter is now under review by the TRA and the State Attorney General. In a related proceeding, Florida Digital Network has filed a petition with the Florida Public Service Commission requesting an investigation of BellSouth's anticompetitive win-back practices.[196] At a minimum, this conduct demonstrates a "see what we can get away with until we get caught" attitude that precludes obtaining Section 271 authority under any reasonable public interest standard.

Further, the litigation in Tennessee revealed that BellSouth was marketing a service to customers in its "BellSouth Select" program that offered preferential treatment in terms of maintenance and repair by having separate Select service managers available to them.[197] At the hearing, BellSouth went to great lengths trying to make clear that Select customers received the identical level of responsiveness from BellSouth service managers as non-Select customers.[198] The witness on behalf of the CLECs in the case made the salient point that if BellSouth had not

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[192] *Id.* at 9 (Opening Statement of Counsel), *quoting* Tennessee Code Annotated Section 65-4-122.

[193] *Id.*

[194] *Id.* at 155, 23 (Opening Statement of Counsel).

[195] *Id.* at 154.

[196] *Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs and for an Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices*, FL PSC Docket No. 020119-TP (filed Feb. 14, 2002).

[197] *TRA Transcript* at 55.

[198] *Id.* at 44-45, 63-68, 200.

violated the law by providing discriminatory service, it had committed fraud by representing that it would provide a superior level of service that was not, in fact, superior.[199]

This conduct clearly goes beyond the bounds of fair competition. BellSouth does not rely on superior service or pricing to keep customers, but instead seeks to undercut CLECs with substandard wholesale service quality which it knows will reflect badly on CLECs as well as disparagement of the CLEC. In addition, BellSouth seeks to capitalize on the recent downturn in the capital markets for CLEC stocks, and increased CLEC financial difficulties, two factors which BOC anticompetitive tactics have played a large part in creating. BellSouth clearly is striving not to promote competition, but to extinguish it. This is precisely the type of anticompetitive leveraging of local monopoly power that the public interest standard was designed to address. BellSouth's current conduct provides no assurance of future compliance, and, in fact, suggests a future of non-compliance with Section 271 standards. The anticompetitive practices of BellSouth further only its interest, and not the public interest, and for this reason alone its application should be denied.

C. The Danger of Premature Entry

The Commission should also be vigilant to ensure against the danger of a premature grant of Section 271 authority. If a BOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.[200] As Dr. Mark N. Cooper of the Consumer Federation of America noted:

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[199] *Id.* at 55.

[200] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service,* California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044,

> [t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.[201]

As the Commission has also noted:

> Section 271, however embodies a Congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.[202]

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market is open to competition after BOC entry.[203] The future of competition is not promising in the BellSouth region. As Mr. Gillan forecasts:

> Not only does the level of competition today not justify BellSouth's claim that is has opened markets to entry, the most likely effect of BellSouth's gaining interLATA authority would be for it to gain even greater dominance in the future. Unless entrants are assured nondiscriminatory access to the inherited network, only BellSouth would be positioned to offer packages that combine local service with other products (such as Internet access and long distance) broadly across the market. Consequently, granting BellSouth interLATA authority will increase its market position at the very *same* time that the Act's sole financial incentive to comply with its market opening provisions is removed.[204]

Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001).

201 *Id.*

202 *Ameritech Michigan 271 Order* at ¶ 388.

203 *Id.* at ¶ 390.

204 *Gillan Affidavit* at ¶ 7.

BellSouth's poor provisioning of facilities, as documented in these Comments, will only serve to preclude the development of viable competition in Georgia and Louisiana. CLECs will need to rely on provisioning of facilities from BellSouth until they can deploy their own facilities. CLECs' use of their own facilities should increase over time as CLECs build out their own networks. There will always be reliance upon BellSouth for some portion of the circuit, typically the last mile to the customer's premise. The purchase of unbundled network elements will serve as a bridge that will provide CLECs "with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[205] As Justice Breyer noted in *Iowa Utilities Board*:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition . . . .[206]

BellSouth's practices impede this "sharing" of the basic facilities necessary to provide competitive telecommunications service.

As the FCC has noted, requiring CLECs to self-provision facilities such as loops would "materially raise entry costs, delay broad-based entry, and limit the scope and quality of a competitor's offerings," and is "not an adequate alternative for loops that a carrier can obtain from an incumbent LEC."[207] BellSouth's poor provisioning of these facilities delays the

205 *UNE Remand Order* at ¶¶ 52.

206 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 416-417 (Breyer, J., concurring in part/dissenting in part).

207 *UNE Remand Order* at ¶ 181.

expansion of CLEC business, which delays the rollout of their own facilities and in turn thwarts facilities-based competition.

D. Turnover of BellSouth Personnel Has Exacerbated BellSouth's Lack of Cooperation

Finally, BellSouth seems to go out of its way to make its relationship with CLECs difficult. BellSouth assigns account management teams to CLECs, but the teams are a revolving door for BellSouth personnel. The turnover of personnel in the account management teams makes it extremely difficult to build any continuity with BellSouth management. The lack of continuity with management makes resolution of problems, such as the outages described above, all the more arduous. The problem with personnel turnover in a firm with the vast resources that BellSouth has available prompts the question whether BellSouth is rotating its account management teams on purpose so that they *don't* develop a working relationship with CLECs.[208]

For all these reasons, the granting of BellSouth's application is not in the public interest.

[208] In addition, US LEC has requested executive-level meetings between US LEC's President, Aaron Cowell, and the President of BellSouth Interconnection Services, Bill Smith. Each such request has been refused by BellSouth. BellSouth fails to provide even the *impression* of cooperation with its CLEC wholesale customers.

VII. CONCLUSION

For the foregoing reasons, US LEC Corp. and XO Georgia, Inc. urge the Commission to deny BellSouth's Application for Provision of In-Region InterLATA Services in Georgia and Louisiana.

Respectfully submitted,

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